

ASSEMBLY BILL

No. 1447

Introduced by Assembly Member Matthews

February 21, 2003

An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 1447, as introduced, Matthews. Proposition 65: enforcement.

(1) The existing Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from discharging or releasing such a chemical into any source of drinking water, except as specified. The act imposes civil penalties upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. The act requires any person bringing an action in the public interest, or any private person filing an action in which a violation of the act is alleged, to notify the Attorney General that such an action has been filed.

This bill would authorize a person who receives a notice alleging a violation of the warning requirements of the act to serve a written offer to enter into a resolution of the notice's allegations, before the enforcement action is commenced. The bill would prohibit a person who brings an action in the public interest from receiving an award of civil penalties if the written offer includes a specified declaration and the person serving the written offer agrees to provide a clear and

reasonable warning or eliminate or reduce the alleged exposure. The bill would also prohibit a person bringing an action in the public interest from receiving attorney's fees, if the written offer agrees to reimburse the attorney's fees and other costs and the person does not achieve a more favorable result than the terms of the offer.

The bill would deem as frivolous an unreasonable rejection of a written offer and the continued prosecution of an enforcement action.

(2) The bill, in conformance with the requirements of Proposition 65, would make a legislative finding and declaration that these changes would further the purposes of the act.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 25249.7 of the Health and Safety Code
2 is amended to read:
3 25249.7. (a) Any person that violates or threatens to violate
4 Section 25249.5 or 25249.6 may be enjoined in any court of
5 competent jurisdiction.
6 (b) (1) Any person who has violated Section 25249.5 or
7 25249.6 ~~shall be~~ is liable for a civil penalty not to exceed two
8 thousand five hundred dollars (\$2,500) per day for each violation
9 in addition to any other penalty established by law. That civil
10 penalty may be assessed and recovered in a civil action brought in
11 any court of competent jurisdiction.
12 (2) In assessing the amount of a civil penalty for a violation of
13 this chapter, the court shall consider all of the following:
14 (A) The nature and extent of the violation.
15 (B) The number of, and severity of, the violations.
16 (C) The economic effect of the penalty on the violator.
17 (D) Whether the violator took good faith measures to comply
18 with this chapter and the time these measures were taken.
19 (E) The willfulness of the violator's misconduct.
20 (F) The deterrent effect that the imposition of the penalty
21 would have on both the violator and the regulated community as
22 a whole.
23 (G) Any other factor that justice may require.
24 (c) Actions pursuant to this section may be brought by the
25 Attorney General in the name of the people of the State of



California, by any district attorney, by any city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by any person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney. The certificate of merit shall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.

(2) Neither the Attorney General, any district attorney, any city attorney, nor any prosecutor has commenced and is diligently prosecuting an action against the violation.

(e) Any person bringing an action in the public interest pursuant to subdivision (d) and any person filing any action in which a violation of this chapter is alleged shall notify the Attorney General that the action has been filed. Neither this subdivision nor the procedures provided in subdivisions (f) to (j), inclusive, shall affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether any person filing any action in which a violation of this chapter is alleged is required to comply with the requirements of subdivision (d).

1 (f) (1) Any person filing an action in the public interest
2 pursuant to subdivision (d), any private person filing any action in
3 which a violation of this chapter is alleged, or any private person
4 settling any violation of this chapter alleged in a notice given
5 pursuant to paragraph (1) of subdivision (d), shall, after the action
6 or violation is subject either to a settlement or to a judgment,
7 submit to the Attorney General a reporting form that includes the
8 results of that settlement or judgment and the final disposition of
9 the case, even if dismissed. At the time of the filing of any
10 judgment pursuant to an action brought in the public interest
11 pursuant to subdivision (d), or any action brought by a private
12 person in which a violation of this chapter is alleged, the plaintiff
13 shall file an affidavit verifying that the report required by this
14 subdivision has been accurately completed and submitted to the
15 Attorney General.

16 (2) Any person bringing an action in the public interest
17 pursuant to subdivision (d), or any private person bringing an
18 action in which a violation of this chapter is alleged, shall, after the
19 action is either subject to a settlement, with or without court
20 approval, or to a judgment, submit to the Attorney General a report
21 that includes information on any corrective action being taken as
22 a part of the settlement or resolution of the action.

23 (3) The Attorney General shall develop a reporting form that
24 specifies the information that shall be reported, including, but not
25 limited to, for purposes of subdivision (e), the date the action was
26 filed, the nature of the relief sought, and for purposes of this
27 subdivision, the amount of the settlement or civil penalty assessed,
28 other financial terms of the settlement, and any other information
29 the Attorney General deems appropriate.

30 (4) If there is a settlement of an action brought by a person in
31 the public interest under subdivision (d), the plaintiff shall submit
32 the settlement, other than a voluntary dismissal in which no
33 consideration is received from the defendant, to the court for
34 approval upon noticed motion, and the court may approve the
35 settlement only if the court makes all of the following findings:

36 (A) Any warning that is required by the settlement complies
37 with this chapter.

38 (B) Any award of attorney's fees is reasonable under California
39 law.

1 (C) Any penalty amount is reasonable based on the criteria set
2 forth in paragraph (2) of subdivision (b).

3 (5) The plaintiff subject to paragraph (4) has the burden of
4 producing evidence sufficient to sustain each required finding.
5 The plaintiff shall serve the motion and all supporting papers on
6 the Attorney General, who may appear and participate in any
7 proceeding without intervening in the case.

8 (6) Neither this subdivision nor the procedures provided in
9 subdivision (e) and subdivisions (g) to (j), inclusive, ~~shall~~ affect
10 the requirements imposed by statute or a court decision in
11 existence on the January 1, 2002, concerning whether claims
12 raised by any person or public prosecutor not a party to the action
13 are precluded by a settlement approved by the court.

14 (g) The Attorney General shall maintain a record of the
15 information submitted pursuant to subdivisions (e) and (f) and
16 shall make this information available to the public.

17 (h) (1) Except as provided in paragraph (2), the basis for the
18 certificate of merit required by subdivision (d) is not discoverable.
19 However, nothing in this subdivision ~~shall preclude~~ *precludes* the
20 discovery of information related to the certificate of merit if that
21 information is relevant to the subject matter of the action and is
22 otherwise discoverable, solely on the ground that it was used in
23 support of the certificate of merit.

24 (2) Upon the conclusion of an action brought pursuant to
25 subdivision (d) with respect to any defendant, if the trial court
26 determines that there was no actual or threatened exposure to a
27 listed chemical, the court may, upon the motion of that alleged
28 violator or upon the court's own motion, review the basis for the
29 belief of the person executing the certificate of merit, expressed in
30 the certificate of merit, that an exposure to a listed chemical had
31 occurred or was threatened. The information in the certificate of
32 merit, including the identity of the persons consulted with and
33 relied on by the certifier, and the facts, studies, or other data
34 reviewed by those persons, shall be disclosed to the court in an
35 in-camera proceeding at which the moving party shall not be
36 present. If the court finds that there was no credible factual basis
37 for the certifier's belief that an exposure to a listed chemical had
38 occurred or was threatened, then the action shall be deemed
39 frivolous within the meaning of Section 128.6 or 128.7 of the Code
40 of Civil Procedure, whichever provision is applicable to the action.

1 The court shall not find a factual basis credible on the basis of a
2 legal theory of liability that is frivolous within the meaning of
3 Section 128.6 or 128.7 of the Code of Civil Procedure, whichever
4 provision ~~is applicable~~ *applies* to the action.

5 (i) The Attorney General may provide the factual information
6 submitted to establish the basis of the certificate of merit on
7 request to any district attorney, city attorney, or prosecutor within
8 whose jurisdiction the violation is alleged to have occurred, or to
9 any other state or federal government agency, but in all other
10 respects the Attorney General shall maintain, and ensure that all
11 recipients maintain, the submitted information as confidential
12 official information to the full extent authorized in Section 1040
13 of the Evidence Code.

14 (j) In any action brought by the Attorney General, a district
15 attorney, a city attorney, or a prosecutor pursuant to this chapter,
16 the Attorney General, district attorney, city attorney, or prosecutor
17 may seek and recover costs and attorney's fees on behalf of any
18 party who provides a notice pursuant to subdivision (d) and who
19 renders assistance in that action.

20 (k) *(1) A person who receives a notice pursuant to subdivision*
21 *(d) that alleges a violation of Section 25249.6 may, prior to the*
22 *commencement of an enforcement action, serve a written offer to*
23 *enter into a resolution of the allegations of the notice. The written*
24 *offer shall be served on the person who is bringing the action in the*
25 *public interest pursuant to subdivision (d) and the Attorney*
26 *General.*

27 *(2) Unless specifically stated otherwise, a written offer served*
28 *pursuant to this section may be accepted by the person bringing an*
29 *action in the public interest pursuant to subdivision (d) within 30*
30 *days after receiving the offer. If the offer provides that time for*
31 *acceptance of the offer extends beyond the time in which the*
32 *plaintiff is authorized to file an enforcement action under*
33 *paragraph (1) of subdivision (d), all statutes of limitations and*
34 *equitable defenses shall be tolled for the duration of the offer.*

35 *(3) If the person bringing an action in the public interest*
36 *pursuant to subdivision (d) accepts the written offer, that person*
37 *shall serve a notice of acceptance on all persons on whom the offer*
38 *was served. The notice of acceptance shall be submitted for court*
39 *approval and reported to the Attorney General as required in*
40 *subdivision (d).*

1 (4) *The Attorney General may, on behalf of himself or herself*
2 *or any district attorney, city attorney, or prosecutor in whose*
3 *jurisdiction the violation is alleged to have occurred, serve a*
4 *notice of acceptance on all persons on whom the offer was served.*
5 *This acceptance constitutes a rebuttable presumption of diligent*
6 *prosecution, for the purposes of paragraph (2) of subdivision (d).*

7 (5) *A person bringing an action in the public interest pursuant*
8 *to subdivision (d) shall not receive an award of civil penalties in*
9 *accordance with subdivision (b) if all of the following apply:*

10 (A) *The written offer served pursuant to paragraph (1) includes*
11 *a declaration under penalty of perjury that the person had no*
12 *actual knowledge of the alleged exposure prior to receiving the*
13 *notice and there is no proof that the defendant had actual*
14 *knowledge of the alleged exposure above the level that requires a*
15 *warning.*

16 (B) *The person serving the written offer agrees to do either of*
17 *the following:*

18 (i) *Provide a clear and reasonable warning.*

19 (ii) *Eliminate or reduce the alleged exposure below the level*
20 *that requires a warning, as defined in subdivision (c) of Section*
21 *25249.10, within a reasonable time.*

22 (6) *If the person submitting a written offer pursuant to*
23 *paragraph (1) agrees to reimburse the reasonable attorney's fees*
24 *of the person filing the action in the public interest pursuant to*
25 *subdivision (d), and for the other costs in investigating the alleged*
26 *violation, and the plaintiff does not achieve a more favorable result*
27 *than the terms of the written offer, the plaintiff shall not recover*
28 *attorney's fees incurred after the date of the offer under Section*
29 *1021.5 of the Code of Civil Procedure, or as a prevailing party*
30 *under any other basis.*

31 (7) *The unreasonable rejection of a written offer pursuant to*
32 *this subdivision and continued prosecution of an enforcement*
33 *action shall be deemed frivolous within the meaning of Section*
34 *128.6 or 128.7 of the Code of Civil Procedure, whichever provision*
35 *is applicable to the action.*

36 SEC. 2. The Legislature finds and declares that this act
37 furthers the purposes of the Safe Drinking Water and Toxic
38 Enforcement Act of 1986.